



## STATEMENT OF THE CASE

Defendant-Appellant Audrey Michael Bryant appeals from the sentence imposed after he pled guilty to theft, a Class D felony (Ind. Code § 35-43-4-2) and forgery, a Class C felony (Ind. Code § 35-43-5-2). We remand in part and affirm in part.

## ISSUES

Bryant raises one issue with subparts, which we restate in the following manner:

- I. Whether trial court abused its discretion by denying Bryant's request for a continuance and for drug treatment.
- II. Whether the trial court abused its discretion by declining to find certain mitigators.
- III. Whether the trial court articulated a proper basis for consecutive sentences.
- IV. Whether the trial court imposed appropriate sentences.

## FACTS AND PROCEDURAL HISTORY

On December 21, 2005, Bryant and Donna Ogans broke into a car and stole a purse. They then proceeded to a Meijer store, where Bryant assisted Ogans in using the victim's credit card to purchase gift cards. Bryant was subsequently arrested and charged with theft and forgery. Bryant pled guilty to the two offenses, and the trial court sentenced him to an enhanced three-year sentence on the theft charge and an enhanced eight-year sentence on the forgery charge. The trial court also ordered the sentences to be served consecutively. Bryant now appeals.

## DISCUSSION AND DECISION

### I. DRUG TREATMENT

Bryant contends that the trial court abused its discretion in refusing to grant his request for drug treatment instead of imprisonment. At the sentencing hearing, Bryant's counsel put him on the stand to "testify as to his substance abuse because no one knows but him." Sentencing Transcript at 34. Thomas Godfrey, who performed volunteer work for the jail chaplain, testified that Bryant had undergone a religious conversion that was going to change his future behavior. Bryant explained that he had been baptized and asked the trial court to postpone sentencing and allow him to seek substance abuse treatment at Richmond State Hospital. He stated that he had been evaluated and accepted into a treatment program, but that he needed additional time to obtain the paperwork from the hospital. However, the State recommended that Bryant be incarcerated for eight years because of his lengthy criminal history. The probation department recommended a seven-year sentence.

Under Indiana drug treatment statutes, if a court has reason to believe that an individual convicted of an offense is a drug abuser or the individual states that he is a drug abuser, and the court finds that the individual is eligible to make the request for drug treatment, then "the court may advise the individual that the individual may be placed on probation if the individual requests to undergo treatment and is accepted for treatment by the division [of mental health]." Ind. Code § 12-23-8-1. If an individual "requests to undergo treatment or is certified for treatment, the court may order an examination by [human services] to determine whether the individual is a drug abuser or an alcoholic and is likely to be rehabilitated through treatment." Ind. Code § 12-23-8-3. As this court stated in reference to the predecessor drug treatment statute, "[t]he clear legislative intent

[of the drug treatment statute] was to reduce drug-related crimes by treating the drug abusers who rely on the fruits of crime to support their drug habit.” *McNary v. State*, 156 Ind.App. 582, 297 N.E.2d 853, 856 (1973).

Here, the record clearly indicates that an examination was warranted. The record further indicates that the examination may have been made by the Richmond State Hospital and that Bryant may have been accepted for treatment at the hospital. It appears that Bryant requested a continuance so that the report could be transmitted to the court. The trial court denied the motion for a continuance and then stated that it “denie[d] the request [that] the defendant be sent to Richmond State Hospital.” Sentencing Transcript at 38.

It is clear that a trial court may deny treatment even if such treatment has been recommended. *See Reas v. State*, 163 Ind.App. 316, 323 N.E.2d 274, 279163 (1975). Once a trial court receives a report from the division of mental health, it is incumbent upon the trial court to exercise its discretion based upon the report and upon other information coming to it to determine (1) whether defendant was a drug abuser, and (2) whether he was likely to be rehabilitated through the division’s drug abuse treatment program. *Easley v. State*, 166 Ind.App. 316, 335 N.E.2d 838, 843 (1975); Ind. Code § 12-23-8-8. In addition, a trial court may deny a request if after conducting a presentence investigation the court finds that the individual would not qualify under criteria of the court to be released on probation.” Ind. Code § 12-23-8-4. Included in these criteria are those set forth in Ind. Code § 35-50-2-2. *See Mogle v. State*, 471 N.E.2d 1146, 1152 (Ind. Ct. App. 1984).

In the present case, the trial court made no findings pertaining to its denial of drug treatment and no determination regarding Bryant's status as a drug abuser or the likelihood of rehabilitation. The trial court's failure to exercise its discretion to make the required determinations is an abuse of that discretion.

We remand with instructions that the trial court make the pertinent findings. Because the trial court may upon remand exercise its discretion to deny drug treatment, we also consider the propriety of the enhanced and consecutive sentences imposed.

## II. MITIGATION

Bryant contends that the trial court erred in not finding certain mitigators. Although a sentencing court must consider all evidence of mitigating circumstances offered by the defendant, the finding of a mitigating factor rests within the trial court's discretion. *Groves v. State*, 787 N.E.2d 401, 407 (Ind. Ct. App. 2003), *trans. denied*. A court does not err in failing to find mitigation "when a mitigation claim is highly disputable in nature, weight, or significance." *Id.* While a failure to find mitigating circumstances clearly supported by the record "may imply that the sentencing court improperly overlooked them, the court is obligated neither to credit mitigating circumstances in the same way as would the defendant, nor to explain why he or she has chosen not to find mitigating circumstances." *Id.* Indeed, sometimes the weight to be given to an alleged mitigator is no weight at all. *Ross v. State*, 676 N.E.2d 339, 347 (Ind. 1997).

Our examination of the sentencing transcript discloses that the trial court found Bryant's extensive criminal history as an aggravator. Bryant claims that the trial court

should have found his guilty plea, his drug addiction, and his expression of remorse to be mitigating circumstances. Instead, the trial court found no mitigators.

Bryant made no argument at the sentencing hearing pertaining to the guilty plea mitigator. When a defendant fails to advance a mitigating circumstance at sentencing, this court will presume that the factor is not significant, and the defendant is generally precluded from advancing it as a mitigator. *Creekmore v. State*, 853 N.E.2d 523, 530 (Ind. 2005), *clarified on rehearing*, 858 N.E.2d 230. However, we note that the trial court did ask about the guilty plea, and the State explained that Bryant agreed to plead guilty in exchange for the State's promise that it would not file a habitual offender charge. Although the entry of a guilty plea can be considered a significant mitigator, it is not given much weight where the defendant receives substantial benefits for the plea. *Sensback v. State*, 720 N.E.2d 1160, 1165 (Ind. 1999). Here, where the trial court inquired about the plea immediately before pronouncing sentence, we cannot say that the court overlooked the plea. Furthermore, in light of Bryant's significant criminal history and the substantial benefit he received from pleading guilty, we cannot say that the trial court abused its discretion in assigning little weight to the mitigating effect of the plea.

At the beginning of Bryant's sentencing hearing testimony, his attorney asked him whether he was "asking the court to postpone sentencing and give you a chance to go to Richmond and get treatment before sentencing here today. . . ." Sentencing Transcript at 31. Bryant answered in the affirmative. At the completion of Bryant's testimony, his attorney characterized the testimony as a reason to continue the sentencing hearing so that Bryant could obtain an evaluation report that would document his eligibility for drug

treatment at Richmond State Hospital. As we discussed above, the trial court specifically denied the continuance and treatment at the hospital. The trial court did not overlook Bryant's testimony; instead, it considered Bryant's drug abuse in the context of his request for a continuance and drug treatment. Given the fact that Bryant did not present his drug use as a mitigating circumstance, but as a reason for treatment, we cannot say that the trial court abused its discretion in not finding drug use to be a mitigator.

Bryant did present evidence pertaining to remorse. He read the following statement to the victim:

Dear Miss Mills, I'm writing this letter to inform you that this is a formal and personal apology. I am truly sorry for any and all inconveniences that this whole incident has caused. Please accept my apology. Your forgiveness means a lot to me. Sincerely yours, Audrey Bryant.

Sentencing Transcript at 37.

The trial court did not mention Bryant's remorse in its sentencing statement. We note, however, that prior to the reading of this letter the State pointed out that Bryant had lived an offense-free year in only five of the last thirty-one years of his life. Sentencing Transcript at 33. In light of Bryant's criminal history, we cannot say that the trial court would have abused its discretion by giving no weight to Bryant's alleged remorse. Even if Bryant's remorse had been found to be a mitigator, its weight would pale against Bryant's three decades of criminal activity.

### III. CONSECUTIVE SENTENCES

Bryant contends that the trial court erred in ordering him to serve consecutive sentences. In general, sentencing decisions are within the trial court's discretion and are

governed by Ind. Code § 35-38-1-7.1. *Henderson v. State*, 769 N.E.2d 172, 179 (Ind. 2002). The trial court's discretion extends to the determination of whether to increase presumptive penalties, impose consecutive sentences on multiple convictions, or both. *Davies v. State*, 730 N.E.2d 726, 741 (Ind. Ct. App. 2000), *trans. denied, cert. denied*, 532 U.S. 945, 121 S.Ct. 1410, 149 L.Ed.2d 352 (2001). When a sentence is enhanced or consecutive sentences are imposed, the trial court must set forth a statement of its reasons for selecting a particular punishment. *Id.* We will examine both the written sentencing order and the trial court's comments at the sentencing hearing to determine whether the trial court adequately explained the reasons for the sentence. *Id.*

Although the trial court's sentencing statement was terse, it is clear that the court found Bryant's criminal history to be sufficient to warrant enhancement of the sentences for each offense and to justify the need for consecutive sentences. A single significant aggravator is sufficient to support the trial court's conclusion. *See Cox v. State*, 780 N.E.2d 1150, 1161 (Ind. Ct. App. 2002) (holding that the use of a single aggravator to both enhance a sentence and to impose consecutive sentences is proper when the single aggravator is "particularly egregious"). As noted above, and discussed in more detail below, Bryant's criminal history is eventful. Therefore, we cannot say that the trial court abused its discretion in concluding that his criminal history supports both enhanced and consecutive sentences.

#### IV. APPROPRIATENESS OF SENTENCE

A sentence authorized by statute will not be revised unless the sentence is inappropriate in light of the nature of the offense and the character of the offender.



Indiana Appellate Rule 7(B). Bryant contends that the enhanced and consecutive sentences are inappropriate in light of the nature of his character. Specifically, he argues that he “showed that he had done well in educational classes (offered in jail), completed a Relapse Prevention program, and was baptized. His guilty plea combined with his drug abuse and his remorse are significant mitigating circumstances which render the eleven (11) year sentence inappropriate.” Appellant’s Brief at 11-12.

The deputy prosecutor made the following statement pertaining to Bryant’s character:

He’s a career criminal, Judge. Next to the picture of your definition of a career criminal in the dictionary is the defendant. He gets out of prison; he commits new offenses. He gets out of jail; he commits new offenses. OWI’s, marijuana, theft, forgery, Federal offenses. . . offenses in Arizona, offenses in Indiana, apparently was supervised at some point in Kentucky. Had an offense in [Houston], Texas. . . He’s gone by several aliases. Anything short of the Department of Correction has been tried in the past, obviously hasn’t worked.

Sentencing Transcript at 33-34.

The pre-sentence report shows that Bryant was convicted of felonies or misdemeanors on over twenty-five occasions in a criminal career that began in 1974 and is interrupted only by periods of incarceration. In his long career, Bryant has committed the bulk of the offenses in Indiana, with additional convictions in Illinois, Texas, Kentucky, and the Federal system. He violated probation in Indiana and had to be extradited from Florida. He also violated his electronic monitoring and his supervised relief in the federal system. Before committing the instant offenses, he was convicted of

approximately eight other thefts and one forgery. Given the extent of Bryant's criminal activity over the course of his life, the enhanced and consecutive sentences are appropriate.

### CONCLUSION

The trial court abused its discretion in denying drug treatment without making any findings. Therefore, we remand with instructions that the trial court exercise its discretion to determine whether drug treatment is both permissible and warranted. We retain jurisdiction, and the trial court is directed to submit its findings to the Clerk of the Supreme Court and Court of Appeals within sixty days of the hand down date of this opinion.

The enhanced and consecutive sentences, to the extent they may be applicable, are appropriate.

Affirmed in part and remanded in part.

SULLIVAN, J., and SHARPNACK, J., concur.